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IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE
SAN JUAN SCHOOL DISTRICT,

Petitioner,

v.

JIMMY SINAJINI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents object to Petitioner's framing of the Question Presented. *See* Petition For A Writ Of Certiorari (hereinafter "Petition"), at pg. i; *see also* S. Ct. R. at 15(2). The properly stated Question Presented is:

To award attorneys fees under 42 U.S.C. § 1988, should the catalyst test be applied to a consent decree that on its face determines plaintiff's prevailing-party status?

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STATEMENT OF THE CASE

Petitioner, Board of Education of the San Juan County School District (hereinafter "District"), seeks review of the Tenth Circuit Court of Appeals' decision in *Sinajini v. Bd. of Educ. of San Juan School Dist.*, 233 F.3d 1236 (10th Cir. 2000). The District's Statement of the Case is not entirely accurate or complete. Some allegations, while accurate, are not relevant to consideration of the question properly presented. S. Ct. R. 14(1)(g). Respondents (hereinafter "Plaintiffs") present a simple straight forward history of this twenty-seven and a half year old litigation.

A. Underlying Litigation

This case was filed as a class action in 1974 alleging that the San Juan County School District denied equal educational opportunities to Native American children in San Juan County, Utah, in violation of the constitution, and applicable statutes and regulations. *Sinajini v. Bd. of Educ. of San Juan School Dist.*, 233 F.3d 1236, 1239 (10th Cir. 2000). In 1975 a Consent Decree was entered pursuant to an Agreement of Parties. *Id.* The 1975 Consent Decree required extensive school construction on the Navajo Reservation, equity in school-financing, and the implementation of educational programs and services beneficial to Native Americans. *Id.*

In 1992, Plaintiffs initiated supplemental proceedings to enforce the 1975 Consent Decree and to raise new issues. The new issues involved alleged racial discrimination and deprivation of equal educational opportunities in a variety of school programs and services, and sought new school construction. The United States District Court, District of

Utah (hereinafter "District Court") limited *Sinajini* to enforcement of the 1975 Consent Decree and struck the new issues raised by Plaintiffs, and by intervenors, the United States of America and the Navajo Nation. *Id.* The District Court ruled that certain issues were beyond the scope of the enforcement of the 1975 Consent Decree and Agreement of Parties. *Id.*

In order to litigate all claims, Plaintiffs maintained *Sinajini* as an enforcement action, filed two separate additional lawsuits, and prepared to intervene in a third discrimination suit to be filed by the United States. *See Sinajini*, 233 F.3d 1236, 1239. One of these cases is *Chee v. Bd. of Educ.*, 2001 WL 109155 (10th Cir. 2001) (special education), the other is the United States matter (school desegregation). In still another case filed by individual plaintiffs, the United States, and the Navajo Nation, Plaintiffs also prevailed when the District Court ruled that the District has a legal duty to provide educational services to Native American children in the context of building a high school on the Navajo Reservation. *Id.*; *see also Meyers v. Bd. of Educ. of San Juan*, 905 F. Supp. 1544, 1578 (D. Utah 1995).

In 1997, the parties resolved the *Sinajini* litigation, *Chee*, and the United States matter. The cases were combined in an omnibus settlement under the rubric of *Sinajini*. *See Sinajini v. Board of Education*, 964 F. Supp. 319 (D. Utah 1997). It is the construction and effect of the 1997 Order and Consent Decree and 1997 Agreement of Parties (hereinafter "Consent Decree") that is at the core of the fee litigation and Petitioners' Petition For A Writ of Certiorari.[1] *Sinajini v. Bd. of Educ. of the San Juan County School Distr.*, 964 F. Supp. 319 (D. Utah 1997).

1. The Consent Decree is not found in Petitioners' Appendix. Accordingly, Respondents' provide this Court with the Consent Decree. *See* Res. App., attached hereto as Appendix A.

B. Attorney Fees Litigation

Following entry of the 1997 Consent Decree, Plaintiffs sought to recover their attorney fees and costs. Plaintiffs and Respondents herein set forth a simple straight forward history of the fee litigation.[2]

The fee litigation was resolved favorably to Plaintiffs when the District Court determined that Plaintiffs were prevailing parties, albeit on only one limited issue. Accordingly, the District Court granted only limited fees and was reversed by the Tenth Circuit Court of Appeals. *Sinajini v. Bd. of Educ. of San Juan*, 47 F. Supp. 2d 1316 (D. Utah 1999), *rev'd*, 233 F.3d 1236 (10th Cir. 2000).[3] The Court of Appeals also denied the District's Petition for Rehearing or Rehearing En Banc. Pet. App. C, 47a, 48a.

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2. The District's statement of the fee litigation does not contain a concise description of facts material to consideration of the Question Presented, properly framed. *See* S. Ct. R. 14(1)(g). Much of Petitioners' recitation of the litigation for fees is simply legal argument rather than a procedural history.

3. The District Court ruled that fees in *Chee v. Board of Education* could not be pursued in *Sinajini*, but should instead be determined solely in *Chee*. Plaintiffs filed an application in the District Court in *Chee*, which was denied. *Chee* was then appealed separately to the Tenth Circuit Court of Appeals. While the appeal was pending, the Tenth Circuit Court of Appeals in *Sinajini* ruled that fees for *Chee* must be decided in *Sinajini*. *See Sinajini*, 233 F.3d 1236, 1240 (10th Cir. 2000). Accordingly, the Court of Appeals dismissed the *Chee* appeal as moot and remanded *Chee* to the District Court with instructions to vacate its judgment. *Id.*, *see also Chee*, 2001 WL 109155 (10th Cir. 2001).

REASONS FOR DENYING THE WRIT

I. THE DISTRICT REQUEST FOR REVIEW IS BASED ON A FAULTY PREMISE.

The District's request for review is based on a faulty premise. The District argues the catalyst test, a method used to determine whether a party prevails for purposes of awarding fees under 42 U.S.C. § 1988 in cases that end without judgment, must be used in cases which are resolved pursuant to a consent decree. *See* Petition, at 11-23. Based upon this erroneous premise, the District argues the Tenth Circuit Court of Appeals's opinion in *Sinajini* conflicts with a case from this Court and decisions of other courts of appeal. *Id.*

Under the catalyst test, fees are recovered in cases where a defendant's voluntary action gives plaintiffs the remedy they sought prior to a judgment or settlement. *Hewitt v. Helms*, 482 U.S. 755, 760-761 (1987). The circuits have defined the catalyst test in different ways. The lack of a uniform definition is evident in the Tenth Circuit. Apparently, the circuit panels agree that the test applies when the relief pursued is obtained without the entry of a final judicial determination. *Sinajini*, 233 F.3d 1236 (citing *Beard v. Teska*, 31 F.3d 942, 945 (10th Cir. 1994)); *see also Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978) (formulating the "*Nadeau* Test").

The *Nadeau* Test has been adopted in the Tenth Circuit. *J&J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1472-1473 (10th Cir. 1985). *Nadeau* uses a two-part analysis. *Id.* at 1475. "[I]n order to be a 'prevailing party' the plaintiff must show (1) that his action is causally linked to the relief obtained and (2) the defendant's conduct in response to the

lawsuit was required by § 1983." *Id.* The court determined that the "causal connection turns on the provocative role of the plaintiff's lawsuit" in acting as a substantial factor or significant catalyst in motivating the defendants to end their unconstitutional behavior. *Id.* Second, the court must address the strength of plaintiff's fee-generating claim. *Nadeau* at 279.

In *Kansas Health Care v. Department of Social & Rehabilitative Servs.*, 31 F.3d 1052 (10th Cir. 1994), the Tenth Circuit Court of Appeals construed the second *Nadeau* prong to mean that plaintiff must show defendant's favorable conduct, taken in response to the suit, was "required" by law. However, another panel relied upon the more traditional *Nadeau* requirement that plaintiff need only show his suit was not frivolous or groundless. *Beard v. Teska*, 31 F.3d at 952. Still another panel used both ways to employ *Nadeau's* second prong by holding that plaintiff must show that defendant's response was required by law rather than a gratuitous response to a frivolous or groundless action. *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1194 (10th Cir. 1998). Although arguably there may be a conflict in the *definition* of the catalyst test, this is irrelevant because the catalyst test does not apply to this case.

II. THE TENTH CIRCUIT COURT OF APPEALS PROPERLY HELD THE CATALYST TEST CANNOT BE APPLIED TO A CONSENT DECREE THAT IS AN ENFORCEABLE JUDGMENT.

A. The Tenth Circuit Court Of Appeals Holding Complies With Supreme Court Precedent.

The Tenth Circuit Court of Appeals held that the catalyst test did not apply to this case. *Sinajini*, 233 F.3d 1236, 1241. However, the Court did not invent a "new standard" which

contradicts precedent set forth by this Court or other circuit courts. On the contrary, the Tenth Circuit Court of Appeals held that the catalyst test cannot be applied to a consent decree that is an enforceable judgment and which on its face alters the relationship of the parties by modifying a defendant's behavior in a way that directly benefits plaintiffs. *Sinajini*, 233 F.3d 1236, 1240-41. This ruling follows *Farrar*, which states:

> Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a *consent decree* or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." Only under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party. In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar v. Hobby, 506 U.S. 103, 111-12 (1992) (citations omitted) (emphasis added).

It is apparent that the Tenth Circuit Court of Appeals made no "new standard" as the District argues. The Tenth Circuit Court of Appeals did nothing more than apply the *Farrar* standards which are specifically applicable to consent decrees. *See id.*

The Court employed the correct procedure contemplated by *Farrar*, reviewed the *Sinajini* Consent Decree and determined that Plaintiffs had prevailed to a greater extent than the District Court had acknowledged. *Sinajini*, 233 F.3d 1236, 1240.[4]

B. The Plaintiffs' Were The Prevailing Party Under the *Farrar* Standards.

The District asserts the catalyst test must be used, even though *Sinajini* was settled with an enforceable permanent injunction which on its face altered the relationship of the parties by modifying defendant's behavior in a way that directly benefitted Plaintiffs and the class of Native American students. *See Sinajini*, 233 F.3d at 1241. Both the District Court and the Tenth Circuit Court of Appeals found Plaintiffs to be the "prevailing party." *Id.* The Tenth Circuit Court of Appeals provided some examples of how Plaintiffs benefitted from the wide-ranging decree and came within the *Farrar* standards.[5] *See Farrar v. Hobby*, 506 U.S. 103 (1992). Since

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4. Even assuming a misapplication of *Farrar*, this alone would not constitute sufficient grounds to grant certiorari. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is *rarely granted* when the asserted error consists of. . . . the misapplication of a properly stated rule of law.") (emphasis added).

5. Plaintiffs prevailed when the decree altered the parties relationship in empowering committees of experts to make recommendations about school programs, the District accepted formal obligations to provide information and accounting procedures and the District agreed to use its "best efforts" to construct an elementary school. *Sinajini*, 233 F.3d at 1241. In addition, the Tenth Circuit Court of Appeals acknowledged that the District Court concluded Plaintiffs prevailed by making the District undertake school construction. *Id.* at 1241-42, *see also Sinajini*, 47 F. Supp. 2d at 1318.

these examples were not intended to be exhaustive, the case was remanded to determine the extent to which plaintiffs prevailed. *Sinajini*, 233 F.3d at 1235, 1242; *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 186 (2000) (district court must address in the first instance any request for costs including fees). It is beyond question that there are substantial successes that benefit Plaintiffs and the class as a result of this comprehensive decree:

1. ¶ 14 (*Sinajini* Agreement, 964 F. Supp. 319, 322): Best efforts to construct the Monument Valley Elementary School. *See Sinajini*, 233 F.3d at 1241.

2. ¶ 14, *Sinajini* Agreement, at 322: Best efforts to construct additional classroom space at Navajo Mountain High School.

3. ¶ 14, *Sinajini* Agreement, at 322: Best efforts to develop a sufficient water source for Navajo Mountain High School.

4. ¶ 14, *Sinajini* Agreement, at 322: Best efforts to continue to operate Mexican Hat Elementary School if the Monument Valley Elementary School is constructed.

5. ¶ 20, *Sinajini* Agreement, at 323: Best efforts to recruit, hire, train and retain teachers and aides certified for bilingual education.

6. ¶ 28, *Sinajini* Agreement, at 324: The District "shall use its best efforts to provide equal access to educational services and courses that are substantially similar, considering the unique circumstances of each District facility and individual community needs."

7. ¶ 31(c), *Sinajini* Agreement, at 325: Best efforts to be used by each committee of experts to complete committee plans for the improvement of educational programs. *Sinajini*, 233 F.3d at 1241.

8. ¶ 37, *Sinajini* Agreement, at 327: Best efforts to provide plaintiffs with compliance information. *Id.*

9. ¶ 2, *Sinajini* Agreement, at 320: The District and other parties shall work together cooperatively and act reasonably in solving education problems.

10. ¶ 3, *Sinajini* Decree, at 320: Injunction entered regarding violations of equal protection, statutes, and regulations. Equal educational opportunities have always been the heart of the case.

11. ¶ 4, *Sinajini* Decree, at 320: The overall Agreement itself operates as an injunction regarding District conduct.

12. ¶ 6, *Sinajini* Agreement, at 321: Retention of jurisdiction by this Court until maintenance of a system of equal educational opportunity for a period of time that will allow the Court to determine it will continue.

13. ¶ 17, *Sinajini* Agreement, at 323: The District shall provide a bilingual program "as required by applicable statutes and regulations."

14. ¶ 23, *Sinajini* Agreement, at 324: The District shall implement a Cultural Awareness Program and develop a plan.

15. ¶ 24, *Sinajini* Agreement, at 324: The District shall provide a special education program "as required by applicable state and federal statutes and regulations."

16. ¶ 27, *Sinajini* Agreement, at 324: Formal obligations regarding accounting procedures. *See Sinajini*, 233 F.3d at 1241.

17. ¶ 28, *Sinajini* Agreement, at 324: The District shall provide and administer an educational curriculum "consistent with applicable statutes and regulations."

18. ¶ 28, *Sinajini* Agreement, at 324: "The District shall make educational programs available so that all students are offered an equal educational opportunity."

19. ¶31(f), *Sinajini* Agreement, at 325: Committee plans for educational reform and improvement "shall comply with all applicable laws."

20. ¶ 5 *Sinajini* Agreement, at 320: The Court's retention of jurisdiction to monitor and enforce the Agreement ensures that the benefits bestowed upon the children in the class will continue to be received by the students far into the future.

21. ¶ 6, *Sinajini* Agreement, at 320: Class action certification extends the relief granted by the Consent Decree to a large class of present and future Native American children.

22. ¶ 9, *Sinajini* Agreement, at 321: The 1997 Consent Decree changed an antiquated and outdated 1975 Agreement and Decree and beneficially restructured the overall relationship of the District and its Native American students.

23. ¶ 12, *Sinajini* Agreement, at 322: The school construction ordered to be undertaken by the District has been determined by the District Court, *Sinajini*, 47 F. Supp. 2d

1316, 1328, and by the Tenth Circuit Court of Appeals, *Sinajini*, 233 F.3d 1236, 1241-1242, to be a "significant claim" for fee purposes.

24. ¶ 15, *Sinajini* Agreement, at 323: The Navajo Tribe agrees to use "best efforts" to provide electrical power at two schools with large numbers of Native Americans, Mexican Hat Elementary School and the prospective Monument Valley Elementary School.

25. ¶ 31, *Sinajini* Agreement, at 324-325: The Consent Decree created committees of experts empowered to make recommendations about District programs. The Tenth Circuit Court of Appeals held that this provision, among others, altered the parties' relationships because the District agreed to change the process through which it approaches decision-making and such alterations will be material and of benefit to the plaintiffs. *Sinajini*, 233 F.3d 1236, 1240.

26. ¶¶ 32-34, *Sinajini* Agreement, at 325-326: The dispute resolution process alters the District's methods of doing business, restructures the parties' relationships, and provides the children with a special access to the District and the ability to beneficially influence District programs and services.

27. ¶ 40, *Sinajini* Agreement, at 327: The State of Utah will use "reasonable efforts" to monitor the District's bilingual, special education, and curriculum programs, further ensuring that the children, and future generations of students as well, will continue to get the benefits of the Consent Decree.

Despite these impressive accomplishments, the District argues in its Petition that the Tenth Circuit Court of Appeals found the Consent Decree "automatically" gives rise to a

prevailing-party status. *See* Petition at pg. 10, 14. This is alleged to be inimical to Section 1988.[6] However, the Court made no such determination. If there had been an automatic assumption of prevailing-party status, the Court would have said so and let it go at that. But, the Tenth Circuit Court of Appeals actually tested the Consent Decree by comparing it to this Court's prevailing-party standards. *Sinajini*, 233 F.3d 1236, 1240 (citing *Farrar*, 506 U.S. at 111-12; *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983): *Maher v. Gagne*, 448 U.S. 122, 129 (1979)). Under this process, a review of the judgment demonstrates that Plaintiffs succeeded in altering the relationship of the parties by modifying the District's behavior in ways that directly benefitted Plaintiffs. *Sinajini* at 1241-42. The Tenth Circuit Court of Appeals held that Plaintiffs had in fact prevailed to a greater extent than the District Court had acknowledged.

6. For example, the District argues that the Tenth Circuit Court of Appeals has created a "new standard," one that "automatically" bestows prevailing-party status, for purposes of § 1988, to plaintiffs who obtain a "nuisance settlement," "regardless of the merit of plaintiff's claims or the correspondence between the relief sought and the relief obtained." *See* Petition at 18-20. The District argues this "new standard" will "deter beneficial compromises, forcing the parties to waste judicial and client resources on potentially needless litigation." *Id.* Such an argument completely misstates the Tenth Circuit Court of Appeals holding in *Sinajini*, 233 F.3d at 1236. The Court specifically held that the District Court must "reconsider[] the *extent* to which Appellants prevailed," and must "reexamine whether Appellants obtained excellent results or only limited success." *Id.* at 1241. Moreover, the standards described by this Court in *Farrar v. Hobby, Hensley v. Eckerhart, Maher v. Gagne,* and discussed herein *infra,* provide ample process to safeguard against the problems raised by the District. The true concern in this regard, however, is the deterrent effect to plaintiffs of denying fee awards in cases resolved by consent decree. *See City of Riverside v. Rivera,* 477 U.S. 561, 577 (1986) (plurality opinion) ("the function of an award of attorney's fees is to encourage the bringing of meritorious civil right claims.")

Id. at 1240. Since the District Court had applied incorrect standards, and flawed the process in other ways,[7] the Tenth Circuit Court of Appeals properly remanded the case. *Sinajini*, 233 F.3d 1236, 1242.

C. There Is No Conflict With Other Circuits.

Cases from other circuits which are purportedly in conflict with the Tenth Circuit Court of Appeals's decision in *Sinajini* actually present no conflict at all when the question of law is *correctly* stated. The issue in this case is whether the catalyst test applies to a consent decree that, on its face, alters the parties' relationship by modifying defendant's behavior in a way that directly benefits the plaintiff. *Farrar*, 506 U.S. at 111-12. On this question, there is no convincing authority that employs the catalyst test (or refuses to use the test) to determine fees when the litigation is resolved by a consent decree and permanent injunction that determines the extent to which a party prevailed. Indeed, courts are admonished not to use the catalyst test where there is a consent decree. *See, e.g., Kilgore v. City of Pasadena*, 53 F.3d 1007, 1011 (9th Cir. 1995).

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7. "The District Court abused its discretion by excluding from the fee award determination, issues that had been stricken from the lawsuit but which were included in the settlement and entered as a judgment approved by the Court." *Sinajini*, 233 F.3d at 1239-1240. The Court improperly excluded from consideration fees associated with *Chee v. Bd. of Education*. *Id.* at 1240. And, the District Court improperly held that Plaintiffs achieved only limited success by applying a formula which viewed the lawsuit as a series of discrete claims rather than focusing on the significance of the overall relief obtained by Plaintiffs. *Id.* at 1242. In rejecting this approach, the Court of Appeals ruled that "[w]hether a party prevails is ultimately an exercise of judgment that is fundamentally qualitative, not quantitative." *Id.*

The cases the District argues are in conflict with *Sinajini* are completely inapposite to this case. In none of the cases cited by the District did the plaintiff obtain a judgment. Thus, fees were appropriately argued pursuant to the catalyst theory. In *Warner v. Independent School District No. 625*, 134 F.3d 1333 (8th Cir. 1998), the plaintiff lost on the merits of the federal claims, and only obtained relief on a state-law claim. Fees were denied because of the complete lack of success on the federal claims. In *Morris v. City of West Palm Beach*, 194 F.3d 1203 (11th Cir. 1999), the plaintiff lost on the merits, but the fee decision was reversed because it did not properly apply the catalyst test. In *Morris*, the Eleventh Circuit used the catalyst test "[b]ecause Appellants did not receive a favorable judgment on the merits or entry of a consent decree or settlement." *Id.* at 1205. Similarly, *Blakenship v. Shalala*, 35 F.3d 273 (7th Cir. 1994) was dismissed as moot and no judgment entered for plaintiffs when the defendants reinstated an old administrative rule making plaintiffs eligible for Medicaid benefits. In that instance, the court determined the catalyst test applied. *Id.* at 276. In *Little Rock School District v. Pulaski County Special School District, # 1*, 17 F.3d 260 (8th Cir. 1994), the defendants voluntarily implemented the relief requested by plaintiff, making the case moot. No judgment was entered in favor of plaintiff, making the award of fees under the catalyst theory appropriate. *Id.* at 262. Given the state of the law, there is no conflict between *Sinajini* and other circuits.

The District argues the Tenth Circuit Court of Appeals "discarded" *Farrar*'s first prong which requires "actual relief on the merits." *See* Petition at 13; *see Farrar*, 506 U.S. at 111-12. This argument clearly misstates the Tenth Circuit Court of Appeals and misquotes *Farrar*. In *Farrar*, this Court held, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim."

Farrar, 506 U.S. at 573 (citations omitted) (emphasis added). "The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *or comparable relief through a consent decree or settlement.*" *Id.* Thus, a consent decree equals "relief on the merits." *Id.*; *see Sinajini*, 233 F.3d 1236, 1241.

In *Sinajini*, many of Plaintiffs' claims that were previously stricken were included in the Consent Decree and should, therefore, be accounted for in the prevailing-party equation. *Id.* at 1236, 1239-40. Plaintiffs prevailed on these multiple and varied claims because they were ultimately reduced to an enforceable judgment. *Id.* at 1240. Thus, the extent of relief on Plaintiffs' claims can be determined by reviewing the Consent Decree itself. It does not need to be accomplished by trial. *Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1980) (per curiam).[8]

The Tenth Circuit Court of Appeals simply recognized that a consent decree is part of the prevailing party equation. On remand, the Tenth Circuit Court of Appeals instructed the District Court to "reconsider" the extent of Plaintiff's success and "reevaluate" whether the Consent Decree "modified the school district's behavior in additional ways that benefitted Appellants." *Sinajini*. 233 F.3d at 1241. This follows *Farrar*. The District's argument, that it settled

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8. In *Hanrahan*, this Court carefully examined the legislative history of § 1988 and quoted from H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976) that "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.' " *Id.* at 756-57. The Court, in examining the Senate history of the attorneys fee act, S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), explained that parties can prevail through a consent judgment. *Id.* at 757.

the case to get rid of a frivolous suit, that it denies all wrongdoing, that it was compelled to do nothing more than what it would have done in any event, that plaintiffs' claims had no merit, and that the outcome was not related to some requirement of federal law, are disingenuous and completely irrelevant to the specific issues. Indeed, the Tenth Circuit Court of Appeals specifically noted "Appellants (respondents herein) prevailed to a greater extent than the district court's Order acknowledged." *Sinajini*, 233 F.3d at 1240. In addition, the District's contention that the "benefits afforded by the 1997 Agreement were . . . not sought by respondent's" is similarly inaccurate. *See* Petition at 21. The relief sought by Plaintiffs was in fact incorporated in the Consent Decree. *See Sinajini* at 1239-40. However, the District Court struck most of Plaintiffs' claims and then determined that one successful claim, school construction, merited an award of fees. *Sinajini*, 47 F. Supp. 2d 1315, 1319, 1323-24 (D. Utah 1999). The Tenth Circuit Court of Appeals held such limitation was "unreasonable because it belies the nature of the settlement process wherein a party might prevail on claims that were previously stricken." *Sinajini*, 233 F.3d at 1240.

The Petition is simply another attempt by the District to try all the claims anew in yet another litigation. However, requiring parties to go back, after a settlement is signed and a consent decree entered, to determine whether claims that have been merged into a final judgment and permanent injunction are meritorious, conflicts with *Farrar*'s prevailing party standards, not to mention common sense. A review of the Consent Decree and the record will suffice. The catalyst test, which applies only to matters settled without a judgment, has no role to play in this case.

The District asserts yet another untenable proposition: that a case can be settled with the entry of a judgment containing specific, enforceable terms which clearly come within *Farrar*'s prevailing-party standards and still the District Court must go back and try the case to determine whether the law has been violated. The District does not explain how this process would work in practice. Nor does the District describe how this procedure would be compatible with Congressional intent in passing the Civil Rights Act. To protect civil rights in this country, there must be enforcement by private parties whose attorneys must be compensated. The Senate Report on 42 U.S.C. § 1988, expressly states "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, 94th Cong., 2d Sess., p. 5 (1976) (quoted in *Maher v. Gagne*, 448 U.S. 122, 129 (1980)); *see also* H.R. Rep. No. 1558, 94th Cong., 2d Sess., p. 7 (1976).[9]

A settlement that is supposed to finish a controversy but which in fact multiplies exponentially with more trials and more appeals certainly conflicts with the intent of Congress to award fees to promote judicial economy.[10] Moreover, the

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9. This is also the position of the United States in a case now under review by this Court, *Buckhannan Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, Supreme Court No. 99-1848. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, 2000 WL 1740742 *2 (2000).

10. The House report on 42 U.S.C. § 1988 specifically states that "[t]he phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." H.R. Rep. No. 1558, *supra*, at 7. "If the litigation (Cont'd)

prospect of endless litigation would violate this Court's admonition that fights over fees should not degenerate into a second major litigation. *Webb v. Board of Educ.*, 471 U.S. 234, 244 n.20 (1985); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). *Sinajini* does not conflict with *Farrar*. Rather, the District's arguments in its Petition fundamentally conflict with *Farrar*. Under these circumstances, review is inappropriate.

III. THE COURT SHOULD NOT HOLD THIS CASE PENDING RESOLUTION OF *BUCKHANNON*.

The District's suggestion that *Sinajini* be held until resolution of a case now before this Court, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, No. 99-1848, has no merit. The *Buckhannon* case presents an entirely different question. In *Buckhannon*, the issue as presented is whether courts should be allowed to use the catalyst test.

Buckhannon raises the question of fees in a manner which is common in catalyst test cases but is not found in *Sinajini*. *Buckhannon* was dismissed as moot, but fees were sought because it was claimed that the lawsuit was a catalyst for action which benefitted plaintiff. Fees were denied because the Fourth Circuit has not adopted the catalyst test. *See Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 203 F.3d 819 (4th Cir. 2000) (attached hereto as Appendix B). This is quite

(Cont'd)
terminates by consent decree, for example, it would be proper to award counsel fees." *Ibid.* "A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." *Ibid.*

unlike *Sinajini* where there is an enforceable judgment in the form of a consent decree. It is, therefore, significant that the Fourth Circuit Court of Appeals acknowledged that *Buckhannon* is distinguishable from cases where judgments, including consent decrees, bestow prevailing party status. *Id.* at 820 (citing *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (en banc, 4th Cir. 1994)).

The resolution of the *Buckhannon* appeal will make no difference to *Sinajini*. If the Court approves of the catalyst test in *Buckhannon*, the ruling will not apply to cases ending in judgments, including consent decrees. These judgments determine prevailing party status by using *Farrar*'s standards. If *Buckhannon* strikes down the catalyst test, the District's defense fails altogether. Either way, nothing will be accomplished by holding *Sinajini* pending a final decision in *Buckhannon*.

CONCLUSION

Based upon the foregoing, the arguments asserted by Petitioner in support of Petition for Writ of Certiorari are without basis. The Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — 1997 ORDER AND CONSENT DECREE AND 1997 AGREEMENT OF PARTIES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED APRIL 24, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 2:74-CV-346-S

JIMMY SINAJINI, *et al.*,

Plaintiffs

and

THE NAVAJO NATION; THE UNITED STATES OF AMERICA, *et al.*,

Plaintiffs-Intervenors,

v.

BOARD OF EDUCATION OF THE SAN JUAN COUNTY SCHOOL DISTRICT, *et al.*,

Defendants.

April 24, 1997

* * *

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SAM, District Judge.

1997 ORDER AND CONSENT DECREE

The Court has reviewed the 1997 Agreement of Parties and has found that relief shall be granted in accordance with it.

It is therefore ORDERED, ADJUDGED, and DECREED:

1. The Court approves and adopts the 1997 Agreement of Parties dated April 24, 1997, which is hereby incorporated by reference into this Order and Decree.

2. The District denies any violation of any state or federal law or any wrongdoing. There has been no judicial determination as to the validity of the claims against the District.

3. The District is hereby generally enjoined from violating the Equal Protection Clause of Fourteenth Amendment, Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6 and § 2000d, and its implementing regulations 34 C.F.R. §§ 100 *et. seq.*, and the Equal Education Opportunity Act of 1974, 20 U.S.C. § 1703.

4. The parties and all persons acting in concert or participating with them are hereby ordered to comply with the provisions of the 1997 Agreement of Parties.

5. The Court shall retain jurisdiction over this action pursuant to paragraph 6 of the Agreement of the Parties.

6. The Utah State Board of Education and the individual members of the Board as designated by the original *Sinajini* complaint are hereby dismissed without prejudice, and the current State Board of Education and the State Superintendent of Public Instruction shall be permitted to participate as Amicus Curiae.

7. San Juan County and individual members of the San Juan County Commission are hereby dismissed without prejudice.

1997 AGREEMENT OF PARTIES

The United States; the Navajo Nation; the individual *Sinajini* Plaintiffs, the Plaintiff-Intervenors, and the Plaintiff Class as defined in paragraph 6 below (collectively referred to hereafter as the "*Sinajini* Plaintiffs"); Taylor Chee, Herman Chee, Jr., and Araidena Chee, by and through their parents and general guardians, Herman Chee, Sr., and Julie Chee (collectively referred to hereafter as the "Chees"); the Board of Education of San Juan County School District; and the individually named Defendants, together with the State of Utah, desire, as parties to this and related pending and potential litigation, to resolve this matter by means of this 1997 Agreement of Parties ("1997 Agreement") as set forth below. Accordingly, the parties, through their respective counsel and subject to the approval of this Court, hereby agree as follows:

1. The parties to this agreement are: (1) Board of Education of San Juan County School District (hereafter "District"); (2) the Utah State Board of Education and State

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Superintendent of Public Instruction as Amicus Curiae (hereafter "State"); (3) the Chees; (4) the *Sinajini* Plaintiffs; (5) the Navajo Nation (hereafter "Nation"); and (6) the United States of America (hereafter "United States"). Parties 4-6 are collectively referred to hereafter as parties plaintiff.

2. The parties desire to put the litigation behind them. All prefer to work together cooperatively to identify creative and constructive solutions to the educational issues that exist rather than continue the litigation process. All parties recognize the commitment of all other parties to act reasonably to see that Native American children, as well as all other children residing in San Juan County School District, receive an appropriate education and an equal educational opportunity and acknowledge that their collective, cooperative efforts, rather than litigation, will most likely result in the delivery of such educational services to all District students.

3. Moreover, the parties are interested in utilizing resources, energy, and time on the delivery of quality educational services to District students, and in dealing with educational issues as they exist today and not in resolving disputes about issues that may have occurred over the last twenty (20) years.

4. The pending *Sinajini* case was limited to a determination of the District's compliance with the provisions of the "Agreement of Parties" entered 5 August 1975 ("1975 Agreement") and subsequently approved by the Court and incorporated into a Consent Decree ("1975 Consent Decree").

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5. The 1997 Agreement and corresponding Order and Consent Decree ("1997 Order and Consent Decree") are intended to resolve the dispute concerning compliance with the 1975 Agreement and related issues, including paragraphs 11-16 of the United States' Complaint-in-Intervention filed in this action, the issues raised in the referral dated February 10, 1994 from the Office for Civil Rights, United States Department of Education to the United States Department of Justice concerning the District's compliance with Title VI of the Civil Rights Act of 1964, and the issues raised in the October 31 1996 letter from the United States Department of Justice to the District.

The District denies any violation of any state or federal law or any wrongdoing as alleged above. The parties acknowledge that there has been no judicial determination as to the validity of the claims and defenses raised by the parties as reflected in this paragraph.

6. The parties agree that this action is properly maintained as a class action pursuant to Rules 23(a) and (b)(2) of Federal Rules of Civil Procedure. The class shall consist of present and future Native Americans who are eligible under applicable statutes for educational services from the District. The *Sinajini* Plaintiff Class shall be notified of this settlement as ordered by the Court in approving the 1997 Agreement or as otherwise required by law. This Court shall retain jurisdiction over this matter until such time as the parties agree or the Court determines upon application by any party, that the parties have, or any party has, completed their obligations hereunder, including obligations under paragraph 3 of the 1997 Order and Consent Decree,

Superintendent of Public Instruction as Amicus Curiae (hereafter "State"); (3) the Chees; (4) the *Sinajini* Plaintiffs; (5) the Navajo Nation (hereafter "Nation"); and (6) the United States of America (hereafter "United States"). Parties 4-6 are collectively referred to hereafter as parties plaintiff.

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3. Moreover, the parties are interested in utilizing resources, energy, and time on the delivery of quality educational services to District students, and in dealing with educational issues as they exist today and not in resolving disputes about issues that may have occurred over the last twenty (20) years.

4. The pending *Sinajini* case was limited to a determination of the District's compliance with the provisions of the "Agreement of Parties" entered 5 August 1975 ("1975 Agreement") and subsequently approved by the Court and incorporated into a Consent Decree ("1975 Consent Decree").

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and that the District has maintained a system of equal educational opportunity for a period of time that will allow the Court to determine that a system of equal educational opportunity will continue.

7. The 1997 Agreement shall be incorporated into and enforced by the 1997 Order and Consent Decree to be entered by the Court.

8. In *Meyers v. Board of Educ.*, 905 F.Supp. 1544 (D.Utah 1995), this Court determined that the District, the State, the United States, and the Nation each has a duty with respect to the education of Native American children residing in the District. The nature and scope of these duties were not fully set forth in the Court's decision. The District expresses its desire and commitment to provide equal educational opportunities to all its students and to maximize the resources available to the District for purposes of funding District programs. The reference to the duties of others should not be interpreted as any attempt to minimize the District's duties and its commitment to the Native American students in its schools, but a recognition of the role others can and should play.

9. The parties hereby agree that given the age of the 1975 Agreement and Consent Decree, the changed circumstances within the District since the date of their execution, and disputes regarding compliance with and the meaning of several provisions of the 1975 Agreement and Consent Decree, the 1975 Agreement and Consent Decree are hereby superseded, dissolved, and replaced by this 1997 Agreement and corresponding Order and Consent Decree.

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PENDING LITIGATION

10. The Chees hereby agree voluntarily to dismiss without prejudice the *Chee* (Case No. 94-C-386-J) case. The parties also agree to stay any further enforcement proceedings in the *Sinajini* matter until such time as the parties have completed their efforts otherwise to resolve disputes as outlined herein. The parties agree that any subsequent proceedings shall be governed by the 1997 Agreement and limited to enforcement of the 1997 Agreement and 1997 Order and Consent Decree and not the 1975 Agreement or 1975 Consent Decree. Legal proceedings shall not be reinstated or commenced by any party until such time as the parties have complied with the dispute resolution provisions of paragraphs 32-34 of this Agreement and all other relevant provisions of the Agreement; provided, however, that disputes raised by the United States shall not be governed by the process established by paragraphs 32-34 of this Agreement until approved plans are in place pursuant to the work of the committees established by paragraph 31.

11. The parties plaintiff shall dismiss without prejudice the State Board of Education and the individually named State Board members as designated in the original *Sinajini* complaint from the *Sinajini* action, provided that the current State Board of Education and the State Superintendent of Public Instruction shall be Amicus Curiae to the 1997 Agreement.

CONSTRUCTION PROJECTS AND FUNDING

12. The District shall hold a bond election in May 1997. The District, the Nation, and the *Sinajini* Plaintiffs shall use

their best efforts to maximize the prospects of the voters of San Juan County authorizing the issuance of the bonds. The District's best efforts shall comply with and be limited by Utah law. If the issuance of bonds is approved in that election, portions of the proceeds therefrom shall be used to add additional permanent classroom facilities at Whitehorse High School; Monument Valley High School shall also be improved by expanding the existing library facilities and adding additional classroom facilities. Nothing in this Agreement shall require the District to use all proceeds from the May 1997 bond election, if approved, on projects mentioned herein or at Navajo Mountain.

13. If the voters of San Juan County fail to authorize the issuance of bonds in the May 1997 election, (1) the building projects identified in paragraph 12, to be built from bond funds, will revert to projects considered from district pay-as-you-go resources and will be subject to prioritization by the Board and the availability of funds; and (2) the construction of the permanent secondary facility at Navajo Mountain will continue to be governed by paragraph 7(a)(1) of the Agreement of Parties in *Meyers v. Board of Education,* Civil No. 93-C-1080J.

14. Regardless of whether the voters authorize the issuance of bonds in the May 1997 election, the parties to this Agreement, other than the United States and to the extent allowed by law, shall use their best efforts to obtain finding from Congress and appropriate federal or state agencies for (1) the construction of an elementary school at Monument Valley sufficient in size to accommodate Arizona and Utah students residing in the Monument Valley/Oljato areas;

(2) additional construction funding to provide space for Arizona students at the high school at Navajo Mountain; and (3) the development of a sufficient water source at Navajo Mountain fully to meet the needs of the schools and community. All parties acknowledge, however, that without substantial financial contributions from the United States, the Nation, or the State of Arizona, including its school districts, or any combination of those entities, the facilities at Navajo Mountain and potential elementary facility at Monument Valley shall be designed to accommodate only the Utah student population. If an elementary school is constructed at Monument Valley, the District shall also use its best efforts to continue to operate the Mexican Hat Elementary School if educationally and financially feasible. The District agrees to make available to Arizona students all reasonably available space, if any, in the temporary and permanent facilities to be constructed at Navajo Mountain and the potential elementary facility at Monument Valley. If within a reasonable time, not less than 24 months nor greater than 36 months, funds for the construction projects identified in this paragraph have not been obtained from other sources, including but not limited to the State of Utah, the Navajo Nation, and the United States, the Plaintiffs retain the right to pursue relief in court after compliance with the provisions of paragraphs 32-34 of this Agreement.

15. The Navajo Nation agrees to use its best efforts to provide water and power at reduced rates for the Mexican Hat and potential Monument Valley elementary schools, so as to offset the utility related expenses of operating two schools as opposed to one.

16. If the effort to secure federal funds or other revenue for the purpose of constructing an elementary school at Monument Valley is not successful, the parties retain the right to pursue legal action relative to the construction of an elementary school at Monument Valley after compliance with paragraphs 32-34 of this Agreement. Nothing in this Agreement shall be construed as imposing any duty or obligation to construct an elementary school at Monument Valley on the District, the State, the Nation, or the United States, that does not exist under current federal, state, or tribal law. The parties hereto agree that no statements, representations, positions, opinions, documents, discussions, minutes or other potential evidentiary items generated by any party after the execution of this Agreement in connection with the effort to secure federal funding for an elementary facility at Monument Valley shall be used in any subsequent legal proceedings of any type. Such items shall be considered evidence of conduct or statements made in compromise negotiations.

BILINGUAL EDUCATION

17. The District shall administer and provide an appropriate educational program for students who are limited English proficient ("LEP") as required by applicable statutes and regulations. In formulating a bilingual or LEP program the District shall take into account the spirit and provisions of paragraphs 33 and 34 of the 1975 Agreement and the large traditional Navajo population in the District.

18. The District and the other parties shall establish a bilingual education committee of at least two and no more

than six members to review the District's existing bilingual program. The "bilingual committee" shall be established and function pursuant to paragraph 31 of this Agreement.

19. The bilingual committee established pursuant to paragraphs 18 and 31 shall, in a constructive, collegial, and cooperative effort, review the District's existing bilingual program and determine whether it is acceptable to the parties. If the plan as written is deemed acceptable, the bilingual committee shall agree upon it as outlined in paragraph 31. The plan shall contain express provisions for an implementation timetable and provide for monitoring and evaluation. The bilingual committee may, if deemed necessary and advisable by a majority of the committee, recommend revisions to the District's existing bilingual program.

20. The District shall also use its best efforts to recruit, hire, provide in-service training to, and retain teachers and teachers' aides certified or trained in bilingual education for the appropriate language group. The parties recognize the difficulties in hiring such personnel because of the limited pool of such personnel.

21. If an "approved plan" is established pursuant to paragraph 31(e) of this Agreement, and if prior to a declaration of compliance pursuant to paragraph 6 of this Agreement the District intends substantially to revise the approved bilingual program or any of its elements, including but not limited to the method for identifying LEP students, the method or methods of instruction, the teacher training program, or the monitoring or evaluation plan, the District

shall hold public hearings prior to approving or adopting any substantial change in the approved plan. Such hearings shall be conducted in regular board meetings noticed as provided by law. Specific written notice shall be provided at least thirty (30) days prior to the hearing to the Attorney General of the Navajo Nation, to the Navajo Nation Division of Education, to the United States, and to *Sinajini* Plaintiff Class counsel.

22. If the process set forth in paragraphs 17-21, and 31 does not result in an approved bilingual plan, the District will continue to use and implement the plan currently in use by the District with appropriate modifications and adjustments as the District deems necessary. All parties shall retain the right to pursue relief in court after compliance with the provisions of paragraphs 32-34 of this Agreement; provided, however, that the United States shall not be required to comply with the provisions of paragraph 32-34 with respect to relief sought pursuant to this paragraph.

CULTURAL AWARENESS PROGRAM

23. The District agrees to continue to incorporate a Native American cultural awareness component into its curriculum and to formulate a more formal cultural awareness plan. The District shall seek the assistance of the Navajo Nation through its Division of Education and the San Juan County Navajo community in formulating a cultural awareness plan.

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SPECIAL EDUCATION

24. In conjunction with the State, the District shall provide and administer a special education program as required by applicable state and federal statutes and regulations. Nothing in this Agreement is intended to create additional rights or limit the rights and obligations of any party or individual under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, and the rules and regulations of the State of Utah and federal agencies promulgated pursuant thereto.

25. The District and the parties plaintiff shall establish a "Special Education Committee" of at least two and no more than six members. The committee shall be established and function pursuant to paragraph 31 of this Agreement.

26. The special education committee shall review the District's special education program and, if necessary, suggest revisions to the District-wide program. If an approved District special education plan is not established, pursuant to paragraph 31, the District shall establish and adopt a formal plan, and all other parties shall retain their rights to pursue relief in court after compliance with the provisions of paragraphs 32-34 of this Agreement; provided, however, that the United States shall not be required to comply with the provisions of paragraphs 32-34 with respect to relief sought pursuant to this paragraph.

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ACCOUNTING PROCEDURES AND EXPENDITURES

27. The District and the parties plaintiff shall each designate one individual to work together in a cooperative effort with the District Business Administrator to make the District's financial information and records more understandable to the public. The District, through its Board of Education, shall consider and, in its sole discretion, implement appropriate policies or procedures, consistent with existing state law and regulations, pursuant to the recommendations that result from this effort.

CURRICULUM

28. The District shall provide and administer a curriculum consistent with applicable statutes and regulations. The parties recognize that allocation of resources and student demands play an important role in curriculum offerings in the District. With this understanding, the District shall make educational programs available so that all students are offered an equal educational opportunity and shall use its best efforts to provide equal access to educational services and courses that are substantially similar, considering the unique circumstances of each District facility and individual community needs.

29. The District and the other parties shall establish a Curriculum Committee of at least two and not more than six members. This committee shall review the curriculum offered in the District and make recommendations for revisions to District curriculum if necessary. The curriculum committee shall be established and function pursuant to paragraph 31 of this Agreement.

30. If the Curriculum Committee and the parties cannot establish an approved curriculum plan pursuant to paragraph 31, the parties shall retain the right to pursue relief in court after compliance with the provisions of paragraphs 32-34 of this Agreement.

COMMITTEE CREATION AND DEADLINES

31. The parties recognize that this 1997 Agreement will be of little real and lasting benefit in advancing District programs and educational efforts if an atmosphere does not exist that allows full, frank, and unfettered exchange of ideas, information, and opinions among the individuals that will be involved in reviewing District programs. In an effort to establish an atmosphere most conducive to the improvement of educational programs, the parties agree to the following framework for the functioning of the referenced three committees. The Bilingual, Special Education, and Curriculum Committees shall be established and operate according to the following guidelines:

(a) The number of individuals to serve on each committee shall be determined by the parties consistent with the provisions of paragraphs 18, 25, and 29, but shall be an even number.

(b) The District shall appoint half of each such committee, and the parties plaintiff shall appoint half of the individuals to serve on each committee by a process to be determined solely by them. The parties shall agree in writing as to the number of individuals to serve on each committee by 15 May 1997. The parties shall then

designate in writing the individuals to serve on each such committee by 1 June 1997. The District shall designate an individual to serve as the chairperson of each committee. The District designee shall be responsible to organize, coordinate, and schedule the meetings and other work of each committee, unless and until a different chairman is selected by the Committee.

(c) Each committee shall use its best efforts to complete a "committee plan" as defined by subparagraph 31(e) by 1 September 1997, and in any event shall complete its work by 2 January 1998, unless the parties mutually agree to the extension of such deadlines for one or more of the committees.

(d) The District and the other parties shall, if necessary, each compensate their own designees serving on each committee.

(e) Each committee shall, if possible, agree to a recommended plan of action for the District in its respective area by a vote of at least a simple majority (51% or more) of its members. A plan so approved by a committee shall be referred to as a "committee plan." Each committee plan shall be submitted to the Board of Education of San Juan County School District, the Navajo Nation, the United States, and to the *Sinajini* Plaintiff class through their counsel. The Board shall have authority to hold public meetings to review committee plans. The Board may reject or approve each committee plan or any part thereof. If the Board rejects a committee plan, or any part thereof, the plan shall not

be binding on the District. The United States, *Sinajini* Plaintiff class, and the Navajo Nation shall also have the right to approve or reject any committee plan. Only committee plans approved by all parties shall be "*approved plans* " binding on the parties hereto.

(f) Failure to reach an approved plan by 15 March 1998 in any area shall allow the parties or any of them to seek relief through the courts after compliance with the provisions of paragraphs 32-34 of this Agreement for each issue for which an approved plan has not been reached, unless all the parties agree in writing to an extension of such deadlines for any committee or committees; provided, however, that the United States shall not be required to comply with the provisions of paragraph 32-34 with respect to relief sought pursuant to this paragraph. Unless expressly set forth herein, nothing in this 1997 Agreement shall be construed to preclude the Board of Education or designated District personnel, separate and apart from any of the committees, from developing, improving, or implementing any District program or plan. All plans shall comply with all applicable laws.

DISPUTE RESOLUTION PROCESS

32. As an important aid to achieving the goal that educational resources be utilized in educational endeavors and not to fund further litigation and also recognizing that the litigation process often destroys the cooperative spirit that must exist among those responsible for and most interested in the educational process in the District, the parties hereby agree to the following dispute resolution process.

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33. A Dispute Resolution Team ("Resolution Team") shall be established. The Resolution Team shall consist of six members, three of which shall be designated by the District, and three of which shall be designated by the parties plaintiff. The District and the parties plaintiff shall identify in writing the individuals to serve on the Resolution Team no later than 1 September 1997. Compensation, if any, to be paid to such members shall be paid by the respective entity designating the individual to be remunerated. The District shall designate an individual to serve as chairperson of the Resolution Team. An official address for contacting the team shall be established, as well as a method for timely notification of all Team members.

34. No action shall be taken in any court by any party concerning any issue which is the subject of this Agreement until there is compliance with this paragraph; provided, however, that disputes raised by the United States shall not be governed by the process established by paragraphs 32-34 of this Agreement until approved plans are in place pursuant to the work of the committees established by paragraph 31. Any complaint, concern, dispute or other disagreement between parties to this Agreement shall be submitted in writing to the Resolution Team.[1] Nothing in this paragraph shall supersede the terms of those certain leases between the Navajo Nation and the Board of Education of the San Juan School District entitled "Lease Agreement for 9-12 School Building" and "Lease Agreement for District Housing" at Navajo Mountain. The Resolution Team shall have thirty

1. Nothing in this Agreement shall relieve any party of its obligations or affect the process to be followed to resolve a dispute arising under Individuals with Disabilities Education Act.

(30) days to hold a hearing or meeting or otherwise confer, and, absent extraordinary circumstances, thirty (30) additional days to make recommendations, including where necessary to the Board of Education, on any issue. Each party shall have the right to accept or reject the recommendation. If the Resolution Team fails to make a written recommendation for action within sixty (60) days, absent extraordinary circumstances, or if any party to a dispute submitted to the Resolution Team rejects the recommendation, all parties shall be free to pursue relief in court regarding the specific matter raised. If a party fails to accept a recommendation in writing within thirty (30) days of receipt thereof, it shall be deemed rejected.

CONTINUING COOPERATION AND MISCELLANEOUS PROVISIONS

35. The parties hereby agree that adoption of this 1997 Agreement will not result in a comprehensive and lasting settlement unless the implementation efforts provided herein are successful. The parties acknowledge the importance that the participants in the implementation efforts be free, to the maximum extent attainable, to participate in an atmosphere of full and complete interchange, without concern of fear that whatever is done or said will be used in subsequent court proceedings if settlement does not result. To promote this atmosphere, the parties agree that acts done and statements made in attempting to develop settlement plans or obtain construction funds shall not be admissible in evidence in subsequent court proceedings. Further, where the settlement process requires the designation of individuals to work together in committees in an attempt to work out an

acceptable settlement each party should have wide latitude in designating the individuals to participate on behalf of the designating party. Such designated committee members, if later called as expert witnesses, may not refer to statements made, acts done, or documents obtained by or from other parties during the cooperative efforts described in this document.

36. The parties shall negotiate agreements concerning costs and attorneys fees in connection with the *Chee* and *Sinajini* litigation and the pending United States' matters as identified in paragraph 5 above. If they are unable to reach an agreement, any party may file and serve an appropriate motion for costs and attorneys fees by July 1, 1997, and the matter shall be submitted to the Court for resolution after appropriate briefing and any further proceedings deemed necessary by the Court. This provision shall not be viewed as any indication that fees are or are not due in this matter.

37. The District agrees to use its best efforts, upon appropriate, reasonable written request, to provide any party with information relating to compliance with this 1997 Agreement. Any objection to such a request shall be in writing within twenty (20) days of receipt of such request.

38. Any of the provisions of this Agreement may be amended by mutual agreement of the parties or upon a showing to the court that the circumstances underlying any particular provision have changed substantially. Such requests shall be made in writing to all parties. If after a reasonable time not to exceed thirty (30) days, the parties have not agreed to an amendment, the requesting party shall be free to file a motion with the Court requesting a change in the Agreement.

Appendix A

39. If any provision of this Agreement is deemed unenforceable by the Court for any reason, it shall not affect the enforceability of any other provision hereof.

40. The State, as Amicus Curiae, agrees to use reasonable efforts according to applicable law to monitor the District's educational efforts in the areas of bilingual education, special education, and curriculum.

41. The parties acknowledge that this Agreement is the product of negotiation and represents a good faith settlement of disputed issues. Nothing in this Agreement should be construed as an admission or acknowledgment in any way that the District has not complied with the provisions of the 1975 Agreement and the Consent Decree or that the District is not in compliance with existing state or federal law in any regard.

42. This Agreement constitutes the complete agreement between the parties. It has been reached in arm's length negotiations. All parties have had the opportunity to review it, comment on its provisions, change provisions as desired, and otherwise participate in its preparation.

APPENDIX B — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *BUCKHANNON BD. AND CARE HOME, INC., et al. v. WEST VIRGINIA DEPT. OF HEALTH AND HUMAN RESOURCES, et al.*, NO. 99-1424 DATED AND DECIDED JANUARY 20, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1424

BUCKHANNON BOARD AND CARE HOME, INCORPORATED; The West Virginia Residential Board and Care Home Association; Dorsey Pierce, by her next friend, Lockie J. Marple, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

and

ALMOST HOME, INCORPORATED; Daisy Layman, by her next friend, Faye Byers,

Plaintiffs,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; Gretchen O. Lewis, Secretary, West Virginia Department of Health and Human Resources; Office of Health Facility Licensure and Certification; Nancy Tyler, Director, Office of Health Facility Licensure and Certification; Sandra L. Daubman, Program Manager, Office

of Health Facility Licensure and Certification; West Virginia Office of the State Fire Marshal; Walter Smittle, Fire Marshal; Gaston Caperton, in his official capacity as Governor of the State of West Virginia; State of West Virginia; West Virginia State Fire Commission; John Beaty, II, Commissioner; Joseph J. Bostar, III, Commissioner; Randy Breeden, Commissioner; James W. Fife, Commissioner; Francis A. Guffey, II, Commissioner; Daniel Hess, Commissioner; Gregory Alan Lay, Commissioner; David L. Tolliver, Commissioner; Stephen C. Mcbee, Commissioner; Bill L. Spencer, Commissioner; Victor Stallard, Jr., Commissioner; J.D. Waggoner, Commissioner; Kenneth Morgan, Commissioner; Joan E. Ohl, Secretary, Department of Health and Human Resources; John Wilkenson, Director, Office of Health Facility Licensure and Certification; Cecil H. Underwood, Governor, State of West Virginia,

Defendants-Appellees,

and

West Virginia State Board of Examiners for Registered Professional Nurses; Laura S. Rhodes, Executive Director, West Virginia State Board of Examiners for Registered Professional Nurses,

Defendants.

Argued Dec. 2, 1999.
Decided Jan. 20, 2000.

Appendix B

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Frederick P. Stamp, Jr., Chief District Judge. (CA-96-106-2).

* * *

Before NIEMEYER and MOTZ, Circuit Judges, and BUTZNER, Senior Circuit Judge.

OPINION

PER CURIAM.

The appellants in this case ask us to reexamine our holding in *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir.1994) (*en banc*), which rejected the catalyst theory when determining whether to award attorneys fees under federal statutes making fees awardable to prevailing parties. As a three-judge panel of the court, however, we are bound by our precedent. *See Joseph v. Angelone*, 184 F.3d 320, 324-25 (4th Cir.1999). Accordingly, we affirm the judgment of the district court that relied on *S-1 and S-2* in denying appellants' motion for attorneys fees.

Buckhannon Board and Care Home, Inc. ("Buckhannon"), which operates residential care homes for elderly people who require some assistance in the activities of daily living, failed an inspection by the West Virginia Office of the State Fire Marshal because it housed residents incapable of self-preservation, in violation of West Virginia law. *See* W.Va.Code § 16-5H-2 (1998) (requiring that all residents of residential board and care homes be capable of

self-preservation). Buckhannon and other plaintiffs commenced this action for a declaratory judgment that the state law violated the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*

While the action was pending, West Virginia amended state law to delete the self-preservation requirement. None of the defendants, however, informed the plaintiffs or the court of the pending amendments. Indeed, the district court noted that the defendants did not even inform their own attorney, who was representing them in this action. As a result of the amendments, this action became moot, and the district court dismissed it.

Although Buckhannon did not obtain the change in state law through an enforceable judgment, consent decree, or settlement, it claimed nevertheless that it was the prevailing party entitled to attorneys fees under the FHAA and the ADA. *See* 42 U.S.C. § 3613(c)(2); 42 U.S.C. § 12205. Buckhannon argued that under a catalyst theory, it obtained the relief it sought through the defendants' voluntary conduct because it filed this action and brought to the state's attention the flaws in its law. The district court observed that if the catalyst theory were available in this circuit, the plaintiffs "might prevail." However, because this circuit had rejected the catalyst theory in *S-1 and S-2*, the district court denied the plaintiffs' motion for attorneys fees.

On this appeal, the appellants challenge "only the district court's ruling on the disallowance of attorneys fees and costs under the 'catalyst theory.' " They urge us to reexamine our

decision in *S-1 and S-2*, which, they acknowledge, would, if applied, require rejection of their appeal.

The Fourth Circuit has determined that panels of the court are bound by the prior decisions of the court, *en banc* or in panel, and that binding precedent can be reversed only by the court *en banc*. *See Joseph*, 184 F.3d at 325 ("As a panel, we are not authorized to reconsider an *en banc* holding even if we happen to be so inclined, which we are not"); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir.1990) ("[A] panel considers itself bound by the prior decision of another panel, absent an *in banc* overruling or a superseding contrary decision of the Supreme Court").

In *S-1 and S-2*, we held that in order to qualify as a "prevailing party" in litigation, the plaintiff must, through the litigation, " 'obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement.' " *S-1 and S-2 v. State Board of Education of North Carolina*, 6 F.3d 160, 168 (4th Cir.1993) (Wilkinson, J., dissenting) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)), *vacated*, 21 F.3d 49 (1994) (*en banc*) (adopting Judge Wilkinson's dissent as the majority opinion). Because the plaintiffs did not bring about the change in West Virginia law through any judgment, decree, or settlement, we conclude that the district court properly applied *S-1 and S-2* to this case. Accordingly, the judgment of the district court is

AFFIRMED.